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RIGHT OF POSTMASTER GENERAL TO FIX INTRASTATE TELEPHONE AND TELEGRAPH RATES.

In 88 Cent. L. J. 335, we discussed the question whether Federal control of the telegraph lines gave the government the right to fix intra-state rates. In this discussion we criticised an opinion by Judge J. C. Anderson of the Supreme Court of Alabama, upholding the right of the Postmaster General to fix such rates on the ground that the telephone and telegraph lines had, by the order of the President, become post roads and therefore a part of the postal system over which the Federal government had exclusive control. In all the recent cases on this subject, so far as we have observed, that is the only case which discusses the present situation from that angle. It seemed to us, after mature reflection, to be utterly untenable. There is nothing in the resolution of Congress which gives even color of validity to such an argument.

Another decision involving the same question was recently decided by the United States District Court for the Western District of Missouri, in the case of Burleson v. Public Service Commission of Missouri (May 9, 1919, not yet reported). In this case, District Judge Stone takes the position that the proviso in the resolution clearly prevents the Postmaster General from fixing rates.

In this case the Postmaster General sought a preliminary injunction against the defendant Commission and members thereof to prevent any interference by defendants with Missouri intra-state telephone rental charges established by complainant. The basis of the Postmaster's extraordinary assertion of the exclusive power to fix intra-state telephone rates is based on the Joint Resolution of Congress of July 16, 1918, which provided that the President, during the continuance of the present war, was authorized, whenever he deemed it to be necessary, to take possession and assume control of any telegraph or telephone system and to operate same in such manner as may be desirable.

The proviso in the Joint Resolution, however, limits the power of the President in the following manner:

"Provided, that nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to taxation or to lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transmission of governmental communications, or the issue of stocks and bonds by such system or systems."

In the case against the Missouri Public Service Commission, the complainant contended that "lawful police regulations included only such regulations as have relation to the public safety, health or morals and did not comprehend control over the financial affairs or income from operation." In answer to this contention the court said:

"It is true that the term 'police regulations' or 'police power' is used in different senses. Congress might have used it here in either sense contended for by the several parties. In our judgment it is here employed the broader meaning. Recognized State regulation of the finances of public utilities extends to supervision or control of the issue of stocks and bonds and of charges for service. Congress here would not have made the 'issue of stocks and bonds' of telephone companies an exception to the police regulation left to the states unless the police regulation intended was broad enough to cover such issue. The police regulation broad enough to include issues of stocks and bonds certainly covers charges for service."

There can hardly be any doubt that Congress did not intend to give to the President the power to fix intra-state rates. This view is borne out by the fact that when the committee in charge of the Resolution was asked in the House of Representatives what would be the effect of the

resolution on the question of tolls and rates, a member of the committee replied that this was "simply a resolution to empower the President in case necessity arises to take over the telegraph and telephone systems. If he does that, Congress will exercise the power that it did in the railroad matter, to fix the rates. (Cong. Rec., Vol. 56, p. 8725.)

There cannot be any doubt that the Postmaster General, in fixing intra-state telephone rates, is assuming a power not only not necessary under any present military emergency, but one not conferred by either the letter or the spirit of the Resolution under which he is attempting to act. We believe that will be also the construction of the Supreme Court, which has always adhered to the rule that a delegation of power which may be exercised by the legislative branch of a state government (and fixing rates is legislative) or any limitation of the state's police power must be clear. (Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412, 419.)

NOTES OF IMPORTANT DECISIONS.

LIABILITY OF INTERSTATE PASSENGER CARRYING LIQUOR THROUGH A STATE INTO A PROHIBITION STATE.—Under the Reed Amendment the transportation of intoxicating liquor *into* a state whose laws prohibit its use, sale or manufacture is made an offense.

The zealous enforcement of this act by federal officials has recently resulted in a case reaching the Supreme Court, which if the construction of the Attorney-General had been sustained would have been not only a very great extension of a very far-reaching law, but a serious attack on the freedom of interstate commerce. United States v. Gudger, 39 Sup. Ct. Rep. 323.

In the Gudger case, defendant was a passenger on a railroad train from Baltimore, Md., to Asheville, N. C., and that while the train was temporarily stopped at the station at Lynchburg, Va., he was arrested, his baggage examined, and it was found that he had in his valise some seven quarts or more of whisky. Defendant had no intention of leaving the train at Lynchburg or at any other point in Virginia, and his sole intention was to carry the liquor with him into the state of North Carolina to be there used as a beverage.

The decision of the Supreme Court is to the effect that defendant could not be prosecuted for carrying liquor *through* a prohibition state, but only for carrying it *into* such state. On this point, Chief Justice White, speaking for the Court, said:

"Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context if there were need to resort to it, since the context maks clear that the word 'into,' as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state being a mere incident of transportation to the state into which it is shipped."

IS THE RIGHT TO MANDAMUS SUBJECT TO THE EQUITABLE PRINCIPLE OF LACHES?—While mandamus is a legal remedy it is subject to the equitable principle of laches rather than to statutory limitations applicable to the usual legal actions. This rule was clearly set forth by the Supreme Court of the United States in the recent case of United States ex rel. Arant v. Lane, 39 Sup. Ct. Rep. 293.

In this case relator, who claimed to be in the classified civil service, was removed from office, as he alleges, by the defendant without cause. He applied for a writ of mandamus two years after his unauthorized dismissal and prayed that defendant be compelled to vacate the order of dismissal and to restore him to his former office. In denying the writ on the ground that relator had waited too long to bring his action, the court said:

"When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

"Under circumstances which rendered his return to the service impossible, except under

the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him, renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

"In this conclusion we are in full agreement with many state courts in dealing with similar problems. McCabe v. Police Board, 107 La. 162, 31 South. 662; Stone v. Board of Commissioners, 164 Ky. 640, 176 S. W. 39; Connolly v. Board of Education, 114 App. Div. 1, 99 N. Y. Supp. 737, and cases cited; Clark v. City of Chicago, 233 Ill. 113, 84 N. E. 170."

WHEN A PER DIEM PENALTY FOR NOT COMPLETING CONTRACT ON TIME WILL BE CONSTRUED AS LIQUIDATED DAMAGES.—At the early common law the courts were inclined to look upon all provisions for the payment of arbitrary amounts for the breach of contracts to be penalties and therefore unenforceable. But in this respect there has been a gradual change in the attitude of the courts who now look at such stipulations with candor, with a view of determining the intention of the parties.

In the recent case of Wise v. United States, 39 Sup. Ct. 303, a provision in a government contract requiring completion of a building contract within 30 months and providing for a payment of $200 per day as liquidated damages for every day's delay, was held not to be a penalty. In explaining the principle applicable to such provisions in a contract, the court said:

"The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in Sun Printing & Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, applied in United States v. Bethlehem Steel Co., 205 U. S. 106, 27 Sup. Ct. 450, 51 L. Ed. 731, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced."

The present attitude of the courts respecting stipulations providing for estimation of the damages that shall probably result from a breach of a contract is based on a proper appreciation of the right of contract and the desire of the parties thereto to avoid disputes over damages of a conjectural character. Who are in a better position than the parties themselves to estimate in advance the damages likely to arise from a breach. The certainty of amount is likely not only to promote prompt performance of contracts, but to discourage litigation.

REMOTENESS PRECLUDING RECOVERY OF DAMAGES FOR BREACH OF CONTRACT.

I. *Remoteness in Construction of Contract.*—Justice Story, speaking of a loss by fire, claimed to be within a policy of fire insurance, said: "We must interpret this instrument according to the known principles of the common law. It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause and not to any remote cause, *causa proxima non remota spectatur*, and this has become a maxim not only to govern other cases, but to govern cases arising under policies of insurance."[1] As applied in that case barratry by master and crew of a vessel causing it to catch on fire was held not covered by a policy insuring against loss by fire caused by the negligence, carelessness or unskillfulness of such master and crew. Here it is perceived that acts negative in their character do not em-

(1) Waters v. Merchants Louisville Insurance Co., 11 Peters 213, 223; 9 L. ed. 691.

brace positive, active wrong on the part of servants.

Justice Curtis said: "We know of no principle of insurance law which prevents us from looking for the sole operative cause (of loss) or requires us to stop short of it, in applying the maxim *causa proxima non remota spectatur.*" Accordingly, it was said that where a loss was "not solely in consequence of a peril (insured against), but in consequence of the misconduct of the servants of the assured, the peril, *per se*, is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause."[2] But the application of the maxim in these cases does not seem to me to be particularly apt, for the reason that they hold that the policies did not, either expressly or impliedly, cover the losses sued for. They are, therefore, mainly valuable, because the maxim is declared a part of our common law by judges eminent in our jurisprudence. The sort of cases I am referring to hereinafter are those which might be thought within the purview of a contract or the contemplation of parties, if not dependent on some contingency taking it out of the scope of its terms.

II. *Remoteness from Intervening Cause.*—In a case where a telegram was sent to sender's agent to buy car of pineapples from A and bank was instructed to wire him money for purchase, the fact that sender's agent failed to inspect car and sender suffered a loss, the intervening act of sender's agent was the proximate cause of plaintiff's loss, under the principle *causa proxima non remota spectatur.* The court said: "If the telegraph company is in default, but their default is made mischievous to a party only by some other intervening cause, this rule prevents the liability of the company, because their default would be only the *remota*, the remote or removed cause of the injury, and not the *proxima*, or nearest cause."[3] There was testimony to show that the message by the plaintiff and by the bank was brought about by the agent of the company telling plaintiff that he was about to telegraph to another dealer in pines than the one who had sent him a price on pines, and he accordingly acted, relying on his agent to see to the quality and packing of the pines, and he failed to perform his duty in this regard.

Supreme Judicial Court of Massachusetts, in approving an instruction by the trial court, shows how closely an intervening cause defeating recovery under an insurance policy may come to what comes within such a policy. The approved instruction said: "Upon the question as to whether peritonitis, if that caused his (insured's) death, is to be deemed a 'disease' within the meaning of this policy and the proximate cause of death, within the meaning of this policy, so as to prevent a recovery, depends upon the question whether or not before the time of his fall and at the time of the fall, he had then the disease, was suffering with the disease. If he was, then, in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover. But if owing to existing lesion caused by that disease, but having not the disease at the time, the same kind of malady, that is, peritonitis, was started up, the company are to be answerable, although, if there had been a normal state of things, the fall would not have occasioned such a result."[4]

The Supreme Court of California, in a case where a bank failed to pay a check drawn on it, though the drawer had money to his credit therein and following such failure the drawer was arrested under a statute against drawing and issuing a check with intent to defraud, said: "It did not necessarily follow that plaintiff would be arrested and charged with a fel-

(2) Gen. Mutual Ins. Co. v. Sherwood, 14 How. 351, 14 L. ed. 452.

(3) W. U. Tel. Co. v. Barlow, 51 Fla. 351, 40 So. 691, 4 L. R. A. (N. S.) 262.

(4) Freeman v. Mercantile Mut. Acc. Assn., 156 Mass. 351, 31 N. E. 1013, 17 L. R. A. 753.

ony because of the bank's act. There was no direct causal connection between the two things. There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency, acting with an independent mind."[5] The Supreme Court of Missisippi held that where a telegraph company wrongfully disclosed the contents of a message to another than the addressee and his attempt to account for the sender sending him the message bared his immoral life to others and caused him to lose social caste and business opportunities, this was the proximate cause of the injury he suffered.[6] In this case the court appears to have proceeded on the theory, that plaintiff was forced to show that he came into court with unclean hands, as "without the aid of his immoral relations with the scarlet woman he cannot show any injury to his self-respect. It thus appears that the courts will not entertain this action at all, although it may appear that the telegraph company has been guilty of a wanton disregard of its public duties." It is somewhat difficult to classify this case. Had it have been claimed that there being nothing on the face of the message showing that special damage would ensue to addressee from disclosure of its contents, then only general damages could be recovered. The principle would then be more clearly apprehended, and humiliation and loss of caste could not be recovered for the revealing or suffering to be revealed a message innocent in appearance. This seems to me to be the meaning of the rule in Hadley v. Baxendale,[7] a case very greatly cited as announcing that a carrier is not liable for special damages for delay in delivery, where there is no notice that they would arise.

III. *Remoteness from Dependency on Act of Third Party.*—If the performance of an executory contract is dependent on the act of a third party, which neither party guarantees he shall perform, there is such remoteness as forbids the recovery of damages for failure to perform. Holmes, Judge, speaking for Supreme Judicial Court of Massachusetts, in an action for specfic performance, where the relief prayed was dependent upon a provision in a lease "that if the premises are for sale at any time, the lessee shall have the refusal of them," said of the provision: "This is simply an agreement to give the lessee the first chance to make a contract—an agreement to sell if the parties can agree, but not otherwise. * * * It is not the event, but the nature of the contract, which is to be considered, and that must be determined by looking at it as it stood at the time it was made." Relief was denied to plaintiff.[8] In the Supreme Court of the United States, it was said that "everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent."[9] It has been said by Supreme Court of Michigan that there is no reciprocity of "benefit" in attempting to bind one "to the performance of a legal impossibility so palpable to the contracting parties that it could not have been seriously intended by the parties as obligatory on either."[10] And in Georgia Court of Appeals it was said: "Generally speaking, if one party cannot hold the other to the terms of the contract and compel him to perform under it or bring an action against him for refusal to perform, the transaction is unilateral, and no contract exists against either party."[11] In North Carolina it was said that "to make an executory contract there must be a consideration to support it, or it will be a

(5) Hartford v. Night and Day Bank, 170 Cal. 538, 150 Pac. 356, L. R. A. 1916 A, 1220.

(6) W. U. Tel. Co. v. McLaurin, 108 Miss. 273, 66 So. 739, L. R. A. 1915 C, 487.

(7) 9 Exch. 341.

(8) Fogg v. Price, 145 Mass. 513, 14 N. E. 741.

(9) Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, 8 Sup. Ct. 1308, 31 L. ed. 854.

(10) Stevens v. Coan, 1 Pinney (Wis.) 356.

(11) Oliver Constr. Co. v. Reeder, 7 Ga. App. 276, 66 S. E. 955.

naked contract—*nudum pactum*. If it is a contract to do something, it must be something the contracting party can do, and it must be something that it is lawful for him to do."[12] In Rhode Island it was said that "when there is lack of power in law to make the promise, there is no legal promise and so no consideration for a collateral promise."[13] In Texas, the same thought has been applied where the independent act is against public policy to be performed.[14]

Contract Void for Want of Mutuality.—It ought to be clear that a void contract should be held not enforceable for any reason whatever, but the observations made in Waters v. Merchants' Louisville Ins. Co., and Gen. Mutual Ins. Co. v. Sherwood, *supra*, cites the maxim *causa proxima non remota spectatur* as applicable in cases where a contract is not to be construed as embracing what was claimed to be within its terms, and thus, too, on this theory it may be claimed, and, with more seeming reason, that what is certainly embraced, though for other reason a contract be void, comes under this maxim. There is, at least, an attempt not of itself unlawful to accomplish a lawful end. But the supposition that damages of any class or character may arise out of a contract not in any way enforceable, is to assume that one may obtain damages regarding something as to which no judgment can be rendered in his favor at all; in other words, the right to obtain a judgment is not a necessary predicate for the assessment of damages on a contract. I pass, therefore, from this heading to the next heading, where is discussed:

IV. *Remoteness Based on Uncertainty.*—In this class of cases there is generally a right of action, but damages may be held only to be nominal. Thus in a New York case,[15] where a contract provided for defendant receiving and paying for news service "not exceeding $300 a week," this was too indefinite to permit any recovery for more than nominal damages, where the defendant refused further performance. Gray, Judge, speaking for five of the six members of the court, one judge dissenting, referring to the contract, said: "It lacked support in one of its essential elements—the absence of a statement of the price to be paid. That was a defect which was radical in its nature and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, cannot be ascertained from the instrument, neither the court nor the jury will be allowed to make an agreement for them upon the subject. It is elementary in the law that for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to."

In a Circuit Court of Appeals decision[16] nominal damages were held recoverable in a case where a colliery company refused to continue supplying plaintiff with coal, the court saying that the price "was left wholly unsettled by the contract and could be made certain only by the further agreement of the parties from time to time, and there is nothing in the absence of such further agreement with which to compare the market price at which coal could have been sold by the plaintiff and thus determine the profits which might have been lost by a refusal to sell at all. * * * Not only is the contract uncertain as to the price to be paid by the firm, but it is not by its terms cap-

(12) Hall v. Fisher, 126 N. C. 205, 35 S. E. 425.

(13) Providence Albertype Co. v. Kent & Stanley Co., 19 R. I. 561.

(14) Specht v. Collins, 81 Tex. 213, 16 S. W. 234; Canoe & Milling Co. v. Erp, 105 Tex. 161, 146 S. W. 155.

(15) United Press v. N. Y. Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288.

(16) Watts v. Weston, 62 Fed. 136, 10 C. C. A. 302.

able of being made certain either by reference to some umpire in case of a disagreement, or by providing that in the absence of agreement it should be taken at the market price."

In an Illinois case,[17] commenting on Fogg v. Price, *supra*, and an English case, it was said: "The clear intimation of both these cases is that that had there been a mode of ascertainment (of the price) provided for, the holdings would have been otherwise," but this conclusion is doubtful and if true it recognizes the principle of lack of certainty avoiding recovery for damages.

In Michigan[18] a contract regarding an exchange of goods and a method of ascertaining the price of undamaged goods, but no method for thus doing as to damaged goods, both kinds being referred to, fixed no sufficiently certain measure of damages as to make it enforceable in the recovery of damages.

In a Pennsylvania case,[19] it was held that a promise by a heavy stockholder of a corporation to an officer thereof that, if any profit is made out of the business of the corporation, he will divide it with him upon a very liberal basis is too indefinite and uncertain to be enforceable. The court said that: "To form the basis of a legal obligation, an offer must be so complete that upon acceptance an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not. The jury were not at liberty to fix or determine a basis for the division of the profit, when the parties themselves had failed to reach any agreement as to that very material matter. Any such attempt by the jury would be nothing more than a guess or conjecture. There was no standard by which they could measure the degree of liberality with which the defendant should reward the plaintiff."

(17) Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

(18) Dayton v. Stone, 111 Mich. 196, 69 N. W. 915.

(19) Butler v. Kemerer, 218 Pa. 242, 67 Atl. 332.

V. *Remoteness in Contingency of Profits.*—In Michigan,[20] it has been held that: "Profits to be recovered for breach of contract must not be conjectural or speculative or dependent upon the chances of business or other contingencies, and must have some reference to the nature of the contract and the breach." The court goes on to speak of the possibility of many contingencies which might arise in the course of carrying out the contract in question, and to declare in such a case that profits are recoverable or may be inquired into would be the adoption of a rule that "would be extremely dangerous."

But it has been held that a contract which is sufficiently definite as to what is principally aimed at, then subordinate provisions indefinite in their nature and if the contract is divisible it should be so treated by the court.[21] But speaking generally as to the rule, it was said: "A lack of certainty as to terms of contract obligations of either party or measure of damages for breach, is simply the misfortune of him who seeks to recover in case of a breach thereof."

Where a business is merely in contemplation, it has been held that profits therefrom are too speculative, uncertain and conjectural to give any basis for measurement of damages.[22] And on broad lines it was early held that profits that may not be calculated on a fairly reasonable basis are not recoverable on a breach of contract.[23] Indeed, the rule as to such profits depends on the sufficiency of proof and this is that prospective profits, in order to be a foundation for recovery, must be "shown that they are, in the ordinary course of events reasonably to be expected." To ascertain

(20) McKinnan v. McEwan, 48 Mich. 106, 42 Am. Rep. 458.

(21) Troy Laundry Mach. Co. v. Dolph, 138 U. S. 617, 34 L. ed. 1083, 11 Sup. Ct. 412.

(22) Webster v. Bean, 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81.

(23) Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756.

what comes within reasonable expectation, evidence of past profits may be taken into consideration.[24] Thus they have been allowed to an excluded partner in an *existing* retail business.[25] There may be some limitation admissible in rulings of this kind, but it must be conceded, that if it may be claimed in any case that there are elements of conjecture and these are not offset by experience, then the rule of remoteness applies.

VI. *Negotiation for Contract.*—There are to be found actions where because of failure by a telegraph company to deliver a message, or to deliver it seasonably, expected contractual arrangements have been prevented, and damages have been sued for. Almost invariably these actions have failed. Thus take a case by United States Supreme Court.[26] The facts show plaintiff sent a telegram directing the purchase of 10,000 barrels of oil on a certain day, which advanced in price very greatly the following day, but there was nothing to show plaintiff would have sold the next day. The court said: "No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place." The court goes on then to discuss cases in which the rule in Hadley v. Baxendale was applied. Among others there was Tel. Co. v. Wenger and Squire v. W. U. Tel. Co.,[27] in the former of which there was a message ordering a purchase of stock, and in the other an actual purchase at a higher price than the party would have had to pay. In both cases there was loss of contract directed to be entered into. In the Hall case there were two contingencies, one was the judgment of sendee to make or not the purchase, the other his judgment as to closing them out the following day. It was said: "The only damage, therefore, for which he is entitled to recover is the cost of transmitting the delayed message." Where there is an offer and there is no satisfactory proof that it would have been accepted, the rule in Hadley v. Baxendale was applied,[28] the court saying: "As the plaintiff's message to the oil company seasonably delivered would not of itself have effected a legal contract * * * it follows that any other than nominal damages would be purely speculative. The oil company might have delivered the barrels, and then again it might not have done so. It might have delivered 1,500 and again it might have delivered a much less number." In a Georgia case,[29] the cases on this subject are quite fully noticed and it is said that: "While there is some conflict in the authorities, the more satisfactory line holds that "compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell * * * as they are contingent upon its acceptance."[30] In that case it was said: "The trouble facing the plaintiff in this case, that there was no finished contract between the parties, but only a proposal for a contract. * * * The failure of the telegraph company did not cause the breach of a consummate contract. It only prevented one that might or might not have been made." It has been held that a statute practically eliminating the

(24) Maguire v. Kiesel, 86 Conn. 453, 85 Atl. 689.

(25) Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018.

(26) W. U. Tel. Co. v. Hall, 124 U. S. 444, 31 L. ed. 279, 8 Sup. Ct. 164.

(27) 55 Pa. St. 262; 98 Mass. 232.

(28) Tanning Exp. Co. v. W. U. Tel Co., 143 N. C. 376, 55 S. E. 777.

(29) Richmond Hosiery Mills v. W. U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

(30) Beatty Lumber Co. v. W. U. Tel. Co., 52 W. Va. 410, 44 S. E. 309, and authorities there cited.

rule in Hadley v. Baxendale may open wider the door, as say in case where a doctor was telegraphed for by another for a prospective patient with whom he had talked, but the telegram was never delivered. It was said: "Here the telegram invited (professional) relations and contract," and "it is alleged that this telegram was sent to plaintiff at the request of the prospective patient. If so, why would not the party have been bound to pay for a professional response thereto?" All of this was said on the question of overruling a demurrer to plaintiff's petition,[31] and it was ruled plaintiff should have had an opportunity to prove his damage. But the case is far from being of a decisive nature. But it says: "This we think, is in accordance with the great weight of authorities elsewhere, except as they are permeated, and the rule of the court controlled, by the rule that the results must have been in contemplation," an exception seeming to me of very great importance and of very general acceptance.

Remoteness in Release by Agent Not Within Power.—Under Head III, *supra,* there are cited cases holding that there is remoteness precluding recovery of damages where an agreement is contrary to public policy. I wish to supplement those cases with authority to the effect that an act agreed to be performed is presumptively not within the authority or power of the promissor. Thus, suppose a contract is between an individual or corporation on the one side and an agent of an individual or a corporation on the other, and presumptively, the agent has no power to bind his principal in the matter. That ought surely to make a contract void for want of mutuality.[32] Now conceding that the agent has the power to make the contract, may he release any advantage there secured to his principal? It is laid down that: "Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal."[33] Of course, it must be admitted that the burden would be on the one relying on such a contract to prove the power of the agent, but, in a case, where the proof is of a character to leave the existence of the power doubtful, would not this create an uncertainty bringing the maxim I have referred to into play? And would not this uncertainty be deepened in a case where subsequent to the entering into a contract no consideration beyond the alleged making of mutual promises took place, and, therefore, no practical construction was put upon the contract. Taft, C. J., has warned against construing as a contract things "intended only as preliminary negotiation,"[34] and Massachusetts Supreme Judicial Court calls attention to alleged contracts which are "only expressive of a present intention."[35]

Summary.—It would seem from the various ways in which the maxim *causa proxima non remota spectatur* has been applied to situations the term remoteness as preventing recovery of damages for breach of contract that the word itself is of such comprehensiveness as to be called *nomen generalissimum,* just as Sir William Blackstone says in the term land, as by it "everything terrestrial will pass."[36] If there is doubt in construction of a contract, or doubt in general uncertainty, or doubt in expectancy of profits, or doubt in the result of negotiation, or doubt in the power of an agent to carry out an agreement, or a lack of mutuality, the maxim may be invoked.

N. C. COLLIER.

St. Louis, Mo.

(31) Barker v. W. U. Tel. Co., 134 Wis. 147, 114 N. W. 439, 14 L. R. A. (N. S.) 533.

(32) Hammon on Contr 682; Hudson v. Browning, 174 S. W. 393.

(33) 39 Cyc. 1387, 1388, citing numerous cases.

(34) Strobridge Litho. Co. v. Randall, 73 Fed. 619, 19 C. C. A. 611.

(35) Wellington v. Apthorp, 145 Mass. 69, 13 N. E. 10.

(36) 2 Black, 19. Cited in Collier on Public Service Companies, §9.

EXPLOSIVES—INHERENTLY DANGEROUS.

MISSOURI IRON & METAL CO. v. CARTWRIGHT.

Court of Civil Appeals of Texas. Ft. Worth. June 8, 1918. Rehearing Denied Oct. 19, 1918.

207 S. W. 397.

Notwithstanding right to blast upon one's own property, liability for damages may result if, in view of all the circumstances, a person of ordinary prudence would reasonably have foreseen injury.

DUNKLIN, J. The Missouri Iron & Metal Company, a partnership composed of Morris Ginsberg and L. Cohen, were engaged in the business of buying and selling scrap iron. Some of their purchases consisted of large wheel shafts and all kinds of old discarded machinery. In order to facilitate the handling and sale of the larger pieces, those pieces would be broken up with charges of dynamite. The place selected for such blasting operations was near a switch of the Texas & Pacific Railway Company near Ft. Worth. A road led from the residence of L. Cartwright and passed within a short distance of the place where the blasting was done to Cartwright's pasture, where he kept his cows; he being engaged in the dairy business. On the occasion hereinafter referred to, Cartwright left his home to go on horseback to his pasture. When he reached the place where the blasting was done, according to his testimony, he spoke to Ginsberg, who always did the blasting and who was then at the place where it was done, saying, "You are still loading, are you?" to which Ginsberg replied, "Yep, still loading." After finishing that conversation, he continued on his way to the pasture, and had traveled only a short distance, when a loud blast was set off, the noise of which frightened the horse he was riding, causing him to jump and throw Cartwright to the ground. As a result of that fall, he sustained personal injuries and later instituted this suit against the Missouri Iron & Metal Company to recover damages for the injuries so sustained. A trial before a jury resulted in a verdict and judgment in his favor for the sum of $750, from which the defendants have prosecuted this appeal.

The suit was predicated upon allegations of negligence on the part of the defendants in the following particulars:

(1) In conducting such blasting operations in the close proximity, to-wit, 30 feet, to the road on which plaintiff was traveling, which was a regularly traveled highway.

(2) In failing to give plaintiff any notice or warning that an explosion was about to occur at that time.

(3) In not confining such blasting operations to some building, inclosure, or pit whereby danger to the plaintiff and the public using said road would be avoided.

The only issues of negligence submitted to the jury as a basis for a verdict in plaintiff's favor were the two first stated.

Appellants insist that as the business in which they were engaged was a lawful business, and as it appears from the allegations in the petition that plaintiff was not injured by being struck by any material thrown by the force of the blast, but as the result only of the fright of his horse on account of the blast, the court erred in overruling their general demurrer to plaintiff's petition.

In support of that assignment, appellants have cited such cases as the following: G., H. & S. A. Ry. v. Graham, 46 Tex. Civ. App. 98, 101 S. W. 846; Hieber v. Central Kentucky Traction Co., 145 Ky. 108, 140 S. W. 54, 36 L. R. A. (N. S.) 54; Bessemer Coal Co. v. Doak, 152 Ala. 166, 45 South. 627, 12 L. R. A. (N. S.) 389; Booth v. Rome, etc., Ry., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552; Holland House v. Baird, 169 N. Y. 136, 62 N. E. 149; Simon v. Henry, 62 N. J. Law, 486, 41 Atl. 692; Mitchell v. Prange, 110 Mich. 78, 67 N. W. 1096, 34 L. R. A. 182, 64 Am. St. Rep. 329.

In the case first cited, Railway v. Graham, plaintiff sought damages against the railway company resulting from fright of his team caused by the sounding of the whistle of an approaching locomotive, and in that case the railway company was held not liable because, as stated in the opinion:

"There was no evidence of any unusual or unnecessary noise at the time the horses ran upon the track."

The court further said:

"Appellant owed no duty to appellee other than that it owed to any other man with a team near the railroad track, namely, to use all reasonable means to prevent injuries to him and his team when seen in a position of danger"—citing cases.

The other authorities cited above were suits for damages resulting from blasting operations in which it was held that no liability on the part of the defendants was shown. In our opinion those authorities seem to go no farther

than to announce the rule as stated in Bessemer Coal Co. v. Doak, supra, as follows:

"One engaged in blasting on his own property is not liable for injuries to a neighbor from mere concussion of the air, sound, or otherwise, unless the work was done negligently, and the injury was the result of the negligence."

We construe all of those decisions in the blasting cases as recognizing the general rule that, notwithstanding the right of a person to blast or perform any other lawful act upon his own property, yet he may be liable for damages resulting therefrom if, in view of all the surrounding circumstances attending the act of blasting on any particular occasion, a person of ordinary prudence would reasonably have foreseen injury to another as a result therefrom and would have refrained from such act by reason thereof.

The rule in such cases is aptly expressed in 29 Cyc. 424, 425, in discussing the duty owing by every one, the violation of which constitutes actionable negligence, in the following language:

"This duty is usually applied by law, the rule being that the law imposes on a person engaged in the prosecution of any work an obligation to perform it in such a manner as not to endanger the lives of persons or others, and the law imposes on every person in the enjoyment of his property the duty of so using his own as not to injure his neighbor. This duty may arise out of circumstances; and this is especially true where a person is using or dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury to bystanders, where an owner has reason to apprehend danger owing to the peculiar situation of his property and its openness to accident, or where it was apparent that if a person did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to another. In such case a duty arises to use such care and skill."

Again, on page 636 of the same work, the following is said:

"Whether or not there has been negligence in the use and conduct by defendant of dangerous instrumentalities and operations whereby plaintiff has suffered injury is a question of fact for the jury."

Also on page 637 occurs the following:

"It is the duty of persons engaged in dangerous operations to give notice to all persons about passing within the limits of possible danger; and the question of negligence in omitting to do so, if persons passing are injured, is for the jury."

Affirmed.

NOTE.—*Injury from Vibration in Blasting Done without Negligence.*—The rule stated in Bessemer Coal Co. v. Doak, 152 Ala. 166, 45 So. 627, 12 L. R. A. (N. S.) 389, to-wit: "One engaged in blasting on his own property is not liable to a neighbor from mere concussion of the air sound or otherwise, unless the work was done negligently and the injury was the result of the negligence," is not wholly supported by judicial opinion, there being a contrariety of view in the cases on this subject.

Among the cases opposed to the view in the Doak case is Fitz-Simons & C. Co., 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421, wherein it was said: "If one who for his own purposes and profit, undertakes to perform a work by means of explosives inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of another, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction." This case was referred to with approval in Chicago v. Murdock, 217 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221

And it was ruled in Longtin v. Persell, 30 Mont. 306, 76 Pac. 699, 104 Am. St. Rep. 723, 65 L. R. A. 655, that blasting causing vibration of earth and air so as to make a nearby residence unsafe for occupation causes liability notwithstanding use of due care in the prosecution of work.

To the same effect is Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

In Patrick v. Smith 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740, it was said: "It seems illogical to say that if one sets off a blast of powder, a substance inherently dangerous on his own premises, which causes a stone to be thrown through his neighbor's window, he is liable without regard to the degree of care used; but if it destroys his neighbor's house, but casts no physical substance upon the premises, he is immune from liability unless it can be shown that reasonable care was not exercised."

In Loudon v. Cincinnati, 90 Ohio St. 144, 106 N. E. 970, L. R. A. 1915 E, 356, the court said: "We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining, and a case where the force of an explosion is transmitted through the soil."

In Watson v. Mississippi R. P. Co., — Iowa —, 156 N. W. 188, L. R. A. 1916, D 101, the court says that: "It will be noted upon reading the cases to which we have referred (those which hold to the rule in the Doak case) and others of their class that, with few exceptions, they refer either to the effect of the use of explosives under the authority of a contract with the general government, or in the construction of railways or canals endowed by the state with the power of eminent domain, or in excavating streets or highways under the authority of the state or local municipality, and, without conceding what is claimed by way of exemption from liability, even in such cases it may well be admitted, that the effect of such circumstances is a question upon which there is room for plausible argument in support of the theory." Then looking at the case at bar the court holds that defendant, though given license or consent to

dam the Mississippi River, is to all intents and purposes as a government contractor" engaged in "a strictly private enterprise for private profit," and as to it the Iowa court favors the opposite to the rule declared in the Doak case. It cites in support of its view, Sullivan v. Dunbaur, 166 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; Hickey v. McCabe, 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425, 19 Ann. Cas. 783; MacGinnis v. Marlborough-Hudson Gas Co., 2220 Mass. 575. 108 N. E. 364, L. R. A. 1915 D, 1080.

Cases on both sides of this question are very abundant and those in support of the view taken in the Doak case wherein are cited New York cases, but it is said in annotation, 12 L. R. A. (N. S.), page 390, that later New York decision since then has radically changed the rule. See an example in Sullivan v. Duncan *supra*. See also annotation in 6 L. R. A. (N. S.) 570.

We are inclined to think later decision does not recognize the distinction between injury by invasion of possession directly by casting substances on the premises or indirectly through the air or through the earth. C.

CORRESPONDENCE.

A LAWYER'S SEMINAR.

Editor, Central Law Journal:

Inter arma leges silent, says an old legal maxim. Whatever may have been the original reasoning behind this maxim, one reason that might be urged in support of its application to the last and greatest war would be that in this war thousands upon thousands of our lawyers turned from "*leges*" to "*arma*." But the signing of the armistice meant, for such of these lawyers as survived, and, thank God, most of them did, an about face, and they are now forsaking "*arma*" and returning to "*leges*." We hope and pray that never again, and certainly not within the lifetime of any of us now living, will this maxim be forced to the front.

The shelving of this ancient and heretofore supposedly necessary arrow in the laws' quiver is attended with the deepest problems of government and of law that ever have demanded solution. For three or four years our nation has been shouting preparedness for "*arma*." The time has now come when we must adopt a system of preparedness with respect to "*leges*." Herein lies the reason for this letter. Herein lies a challenge to the American Bar.

Well may we lawyers recall Daniel Webster's toast at the Charleston Bar Dinner: "The law —it has honored us—may we honor it."

Seriously and thoughtfully may we study the following from Bacon: "I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; *but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance.*"

I anticipate you will agree that only in exceptional instances are the members of the bar consciously striving to strengthen the foundations of the law. And never was there greater need than right now for the bar, and each member thereof, to be well grounded.

The bar of our nation needs to stand shoulder to shoulder upon a solid platform of sound law, and to strive as a single whole to preserve the basis and integrity of our institutions.

How shall our American bar unite in a program of preparedness? How may we create a widespread realization of the larger professional duties assumed or which should have been assumed by every member of the legal fraternity when he took his oath of office? How may we accept the challenge of the times?

First: by study, and study not limited to strict law.

Second: by comparison of ideas between individuals, including the comparison of legal concepts with those in other fields of thought.

Third: by comparison of ideas between lawyers grouped as to different sections of the same state.

Fourth: by comparison of ideas between lawyers grouped according to state lines.

The essence of this system of preparedness is first, individual study, and second, group study. Its aim is the uniting of the entire American bar in one tremendous joint preparation for the duties ahead. Such preparedness would prove as adequate for "*leges*" as our military preparedness has proven for "*arma*." To the degree to which such a program is made nation-wide, to that degree will it prove efficient.

Concretely, I would propose what might be called a Lawyers' Seminar, to be held annually for a certain number of weeks, say from four

to eight, with one meeting per week, to be carried out in every city in the country of sufficient size to warrant it, and to be attended by all lawyers of the particular city whose interest had been aroused by a systematic, wholesome advertising of the Seminar. A uniform outline of study and discussion should be followed throughout the country, which would be arranged by a central organization. This central organization would also select a thoroughly representative and leading member of the bar of each city to lead the Seminar. Papers would be read, say, one or two at each meeting, a copy of which would be sent to the central organization where any novel or good ideas would be extracted and made use of. Possibly a central bureau could be established, to act as a resolvent to compile and publish such legal works as seemed advisable, for many ideas and suggestions inevitably would come from these papers. These publications would then in fact be the work of our entire bar, and would present the combined and distinctive legal thought of the country. I do not mean merely reprinting the papers, but preparing regular books, based on ideas collected from the papers.

To forestall the objection that an organization competent to handle such a Seminar could only be built up slowly, it may be recalled that the American Bar Association could inaugurate such a program with facility.

Realizing, of course, that no product of the human mind is perfect, and that such products variously approach or fail to approach perfection, I offer the plan of a nation-wide Lawyers' Seminar as a method for meeting the stress which inevitably will be put, and in fact is now being put upon our institutions. The need of serious and widespread preparation cannot be questioned. We must progress. Either let a better solution be presented, or let's get busy and launch a Nation-wide Lawyers' Seminar.

I should be glad if this letter could find space in your correspondence column, accompanied by an invitation to discuss the problem herein presented, and its solution.

Yours, for preparedness,

HENRY C. CLARK.

Jacksonville, Fla.

[The editor is delighted to print Mr. Clark's letter and to extend an invitation to our readers to discuss the proposition.

One objection to Mr. Clark's ambitious scheme will be that we are all too busy to study. But is not this one of the insidious dangers of our present day civilization? Modern life is too superficial and the thousand and one inconsequential demands upon our time leave us no opportunity to study thoroughly the problems confronting us.

Others will say that the lawyers of different states are no longer interested in the same problems. This may be true to some extent. The problems of water rights, for instance, are not the same in Maine and Colorado and questions of law which would be most interesting in a commercial state like Connecticut might not particularly concern the lawyers of an agricultural state like Iowa. And yet these apparent differences in the problems which confront the lawyer in different states are more apparent than real. Fundamental principles operate in the solution of both problems, only with differing applications. And one of the purposes of Mr. Clark's scheme is to get the lawyer to relate these great principles to all the various problems which confront our civilization.

At any rate the suggestion is worthy of some consideration and possibly out of it will come some plan by which lawyers can contribute something at this time which will help to shape the destinies of the world's life.—EDITOR.]

DOES FEDERAL CONTRAL OF THE TELEGRAPH LINES GIVE THE GOVERNMENT THE RIGHT TO FIX INTRASTATE RATES?

Dear Mr. Robbins:

Your editorial of May 9th breathes the true spirit of the constitutional relation between the Federal Government and the States as will be evidenced by the debates in the Virginia Convention that adopted the Federal Constitution on a close vote. It was argued by those advocating the adoption that intrastate commerce and police power, if not assured to the States in the original document, would be guaranteed by suitable amendments. These Mr. Madison prepared and offered in the Congress sitting in New York. They were adopted. No man except Patrick Henry has ever questioned James Madison's fidelity to his pledged word. It was this faith in him that always defeated the opposition of Patrick Henry and his noisy oratory. Congress, therefore, under no conditions, has the power to regulate intrastate commerce or interfere with the police power of the States. The maintenance of this governmental policy in all its vigor is a very sacred individual and judicial duty.

Judge Anderson's misinterpretation of the letter of the President's proclamation, as pointed out by you, accounts for his error in unwarrantably extending the intention thereof to embrace purely State measures. Interference with the States is expressly inhibited. Judge Anderson also seems to be the pioneer in mak-

ing the telegraph and telephone a part of the postal system. The violence of the assumption throws upon him a burden of proof, he did not sustain, and of which the case is not susceptible. Yours sincerely,

THOMAS W. SHELTON.

Norfolk, Va.

BOOK REVIEW.

BARNES FEDERAL CODE.

The rapid expansion of federal legislation to cover fields heretofore under the exclusive supervision of state legislation has made the subject one of increasing importance to the general practitioner. Nor does the present official form of codification of federal statute law make this law available to the practitioner. The Revised Statute of 1873 with Supplement revisions in two separate volumes to 1901, and the Statutes at Large of the Acts of Congress, was until recently the only sources of information. The inaccessible character of the official publications, together with the increasing demand from lawyers has incited several publishers to bring out compilations of federal statute law. Among these compilations, that of Mr. Uriah Barnes in one volume is probably the handiest. It is not as thoroughly annotated as the more pretentious encyclopedic compilations, but is intended as a manual for quick and ready reference. The volume contains all the general laws of the United States printed in small but very clear and readable type on over two thousand very thin pages of bible paper. Its arrangement is simple and logical. The classification is by subject matter. There are sixty chapters under such general heads as "Congress," "The President," "The Department of War" and other departments separately treated, "The Judiciary," "The Army," "The Navy," "The Militia," "The States," "The Territories," "The Insular Possessions," "Indians," "Public Lands," "Internal Revenue," "Common Carriers," "Federal Trade Commission," "Food, Drugs and Liquors," "Federal Farm Loans," "Natural Defense," etc. In addition to this admirable arrangement, there is a splendid index referring to the statutes under such common catch words as "Personal Injuries," "Limitation of Liability," "Lost Instruments," "Graphophones," White Slave Traffic," "Films," etc.

The attractive features of the book are, principally, its admirable arrangement, its accessible index and its beautiful typography.

Printed in one volume of 2831 pages, on thin bible paper, bound in flexible leather and published by Bobbs-Merrill Co., Indianapolis, Ind.

HUMOR OF THE LAW.

In a case of assault by a husband on his wife, the injured woman was reluctant to prosecute.

"I'll lave him to God, yer honor," she said.

"Oh, dear, no," said the judge. "It's far too serious a matter for that."—*Boston Transcript.*

A Texan was elected justice of the peace in his county last fall who evidently had no thought of ever resigning.

As soon as the votes were counted he rushed to the local print shop and ordered a supply of quarterly reports, which he knew had to be sent promptly to the state authorities in order to hold his job.

"How many of these quarterly reports do you reckon you want me to print for you, Bill?" asked the printer.

"Oh, I reckon you better make it about a thousand. I'll duplicate the order as soon as the fees commence rolling in."

An American was twitting an Englishman upon the English manner of pronouncing names. He started with Cholmondeley, and demanded to know how it could, by any process of reasoning, be made into "Chumley," and coming on down to Wemyss begged to be told how anybody could get "Weems" out of it.

"Well," said the Englishman, "your American Secretary of State spells his name *L-a-n-s-i-n-g*, and you pronounce it 'House.'—*New York Evening Post.*

Judge Roberts was up against a tough proposition. Mandy, an old black servitor of the family, who had retired from active service, was up before the judge for disturbing the peace.

"Good mawnin', jedge."

"Good morning, Mandy. Mandy, I am very sorry to see you up here, and I want to know if it is true that you hit Susie Jones with a flat iron."

"Yessa, jedge, I hit her. Jedge, how is yo' maw?"

"Now, Mandy"—

"Lordy, that man sho' do look like his paw."

"See here, Mandy"—

"Honey, you sho' is gettin' better lookin' every day."

"Order in court."

"Jedge, is yo' paw still got the rheumatiz?"

"Prisoner is discharged. Next case."

"Thankee, jedge, thankee."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Bailment**—Artisan.—An artisan who repairs an automobile has a lien at common law, for his charges, independent of statute.—City Nat. Bank of Wichita Falls v. Laughlin, Tex., 210 S. W. 617.

2. **Bankruptcy**—Act of Bankruptcy.—In view of Bankruptcy Act, §§ 4a, 18 g, and section 7, subd. 8 (U. S. Comp. St. §§ 9588, 9602 and 9591), where a farmer files petition in voluntary bankruptcy, the act of bankruptcy is committed upon the filing of the petition.—Riggs v. Price, Mo., 210 S. W. 420.

3.——Bulk Sales Act.—Under Bankruptcy Act July 1, 1898, § 47a(2), as amended by Act June 25, 1910, § 8, and sections 70a(4) and 70e (Comp. St. §§ 9631, 9654), held that a trustee of a South Dakota bankrupt may maintain an action against a purchaser of a stock of goods from the bankrupt and one to whom the consideration was paid, where the parties did not comply with the Bulk Sales Act of South Dakota.—Brown v. Kossove, U. S. C. C. A., 255 Fed. 806.

4.——Discharge.—Company which indorsed notes was absolved from liability to indorsee bank by reason of its discharge in bankruptcy.—Hardy Buggy Co. v. Paducah Banking Co., Ky., 210 S. W. 452.

5.——Severable Contract.—Valid parts of severable contracts, which contain both valid and void or voidable parts, may be enforced, if the consideration and agreement are tainted with no fraud or immorality, although the void or voidable parts cannot be; hence, where part of the bonds issued by a corporation that later became bankrupt were valid, and supported by a good consideration, such bonds are enforceable, although other bonds given for the purchase of the corporation's own stock were not entitled to priority over claims of subsequent creditors without notice.—Edgar v. Ames, U. S. C. C. A., 255 Fed. 835.

6. **Bills and Notes**—Certified Check.—Any knowledge which an agent of an indorser on a certified check may have as to it being issued and unlawfully certified without funds of the drawer to cover it is not imputable to one to whom such agent gives the check in payment for land purchased for his principal.—Smith v. Hubbard, Mich., 171 N. W. 546.

7.——Presentment.—The rules as to prompt presentment for payment are not so strictly applied to certified checks as in the case of ordinary checks, notes or similar negotiable paper; such checks being by custom certified, so that the holders may use them as a substitute for money.—Smith v. Hubbard, Mich., 171 N. W. 546.

8.——Public Policy.—In an action on a note held by one who has taken it as collateral and based upon a contract contrary to public policy, there can be no recovery by a plaintiff, unless his bona fides be established.—Pratt v. Duncan, Mich., 171 N. W. 337.

9.——Value Received.—The use of the words "value received" in a note did not import a consideration, where the testimony showed there was no consideration.—Shriver v. Danby, Del., 106 Atl. 122.

10. **Carriers of Goods**—Bill of Lading.—An order bill of lading, though negotiable, represents money, not property.—J. F. French & Co. v. Pere Marquette Ry. Co., Mich., 171 N. W. 491.

11.——Conversion.—Assuming that it is duty of carrier to notify consignor of refusal of consignee to accept goods, mere failure to do so does not of itself constitute a conversion.—Ocean S. S. Co. of Savannah v. People's Shoe Co., Ala., 81 So. 241.

12.——Reasonable Compensation.—A rule of common law is that a common carrier should charge in each particular case a reasonable compensation for the carriage or service rendered and no more.—Murphy v. New York Cent. R. Co., N. Y., 122 N. E. 700, 225 N. Y. 548.

13. **Carriers of Passengers**—Assault by Employe.—The rules governing the liability of railroad companies for assaults by employes on passengers do not in their entirety apply to surface street railroads.—Will v. Milwaukee Electric Ry. & Light Co., Wis., 171 N. W. 658.

14.——Conditions on Ticket.—In case of full-fare ticket, passenger is not bound by conditions thereon limiting common-law or contractual liability of carrier, unless such conditions are called to attention of passenger and assented to by him.—Thurston v. Northern Nav. Co., Mich., 171 N. W. 423.

15. **Charities**—Hospital.—A religious corporation organized to operate a hospital is liable for injuries to a servant through its negli-

gence, though money received by it was expended in maintaining institution for poor, to pay off a mortgage, and to support its mother institution in another state.—Hotel Dieu v. Armendarez, Tex., 210 S. W. 518.

16. **Chattel Mortgages**—Conditional Sale.—A chattel mortgage is at law a conditional sale, which vests the legal title, and, prima facie, the right of possession, to the thing mortgaged in the mortgagee.—Sapirie v. Collins, Ind., 122 N. E. 679.

17. **Common Law**—Declaratory Principle.—Where the statutes and the Constitution are merely declaratory of common principles and do not define the civil rights and remedies in any given case, the common law of England, so far as not inconsistent with the Constitution and laws of the state, is applicable.—City Nat. Bank of Wichita Falls v. Laughlin, Tex., 210 S. W. 617.

18. **Contracts**—Ambiguity.—Nothing can be added to or read into a written agreement unless there be ambiguity which gives play for judicial interpretation.—Jermyn v. Searing, N. Y., 122 N. E. 706, 225 N. Y. 525.

19.——Consideration.—Under the rule that the doing of something that one is not legally bound to is sufficient consideration, payment on purchase price in advance of time that it is due is sufficient consideration for contract reducing the price.—Johnson v. Broughton, Ky., 210 S. W. 455.

20.——Ejusdem Generis.—Rule that where, in a contract, words of a general description are followed by a specific and minute description, the latter limit the former to the property particularly described, is not conclusive, if the real intention of parties can be ascertained from the instrument, or from their interpretation and construction.—Barnett v. Logan, Mo., 210 S. W. 440.

21.——Excavation.—The word "excavate" as ordinarily used in a construction contract covers the removal of a solid rock, as well as earth and loose material.—Rosenberg v. Turner, Va., 98 S. E. 763.

22.——Public Policy.—Contract or sale expressly forbidden by law, and made a criminal offense, is void, although the statute does not so declare.—Brown v. Kossove, U. S. C. C. A., 255 Fed. 806.

23. **Corporations**—Capital Stock.—A stockholder has a right to purchase such proportion of the unissued authorized capital stock of a corporation, when the issuance and sale thereof are directed, as his holdings bear to stock then outstanding.—Titus v. Paul State Bank, Idaho, 179 Pac. 514.

24.——General Manager.—The actual authority of the vice-president and general manager of a company leasing coal mines to sell the lease, the company's sole asset, for cash, did not carry with it authority to sell for anything less than cash.—Empire Coal Mining Co. v. Empire Coal Co., Ky., 210 S. W. 474.

25.——Minority Stockholders.—A court of equity has power at a suit of the minority of the stockholders of a corporation to order a division of its assets, where safety of interest of minority stockholders require it.—Dill v. Johnston, Okla., 179 Pac. 608.

26.——Stockholder.—As between a corporation and its stockholders, the latter get nothing until dividends are declared.—In re McKeown's Estate, Pa., 106 Atl. 189.

27. **Criminal Law**—Collateral Evidence.—Collateral proof of another offense by another is permissible, where the issue is fraud, to aid in determining guilty knowledge.—People v. Willson, Mich., 171 N. W. 474.

28.——Confession.—Defendant's confession of his connection with the crime will justify conviction when the facts making out the substantive crime were shown otherwise.—Clark v. State, Tex., 210 S. W. 544.

29.——Good Character.—Good character is an element to be considered by the jury in every case where an attempt is made to show good character, and is not limited to doubtful and circumstantial cases.—People v. McKeighan, Mich., 171 N. W. 500.

30.——Withdrawal of Evidence.—One offering a writing as evidence may at any time withdraw same before it reaches the jury.—Taylor v. State, Tex., 210 S. W. 539.

31. **Death**—Eyewitnesses.—When there are eyewitnesses to an accident, the legal presumption that a decedent was free from contributory negligence does not obtain to the full extent as in cases where there were no eyewitnesses.—Patterson v. Wagner, Mich., 171 N. W. 356.

32. **Dedication**—Express and Implied.—There are two classes of dedications of a street or alley to a city, express and implied; the intent to dedicate being essential to both, though an implied dedication is founded on doctrine of estoppel in pais, so that intent to dedicate need not actually exist in mind of owner.—Keppler v. City of Richmond, Va., 98 S. E. 747.

33. **Divorce**—Modifying Decree.—The power of the court given by Comp. Laws 1915, § 11417, to modify decree as to alimony, is not affected by the fact that the decree is based upon a property settlement entered into by the parties and embraced in the decree.—Skinner v. Skinner, Mich., 171 N. W. 383.

34. **Easements**—Light and Air.—Where a right of way over the lands of another is granted, the grantee is entitled to sufficient light and air to permit the reasonable use of the way for ingress and egress.—Grinnell Bros. v. Brown, Mich., 171 N. W. 399.

35. **Equity**—Clean Hands.—In the case of both husband and wife, plaintiff did not come into court with clean hands, and, failing in such attempt, decision giving it an equitable mortgage for full amount of the mortgage will not be upheld on appeal to secure a debt for a less amount.—Meade County Bank of Sturgis v. Fredricks, Ky., 171 N. W. 607.

36. **Estoppel**—Standing-by.—A lessee who stands by and sees another purchase land and enter upon it under claim of right, and permits him to make expenditures or improvements under circumstances calling for notice or protest, cannot afterwards assert his own title against such person.—Empire Coal Mining Co. v. Empire Coal Co., Ky., 210 S. W. 474.

37. **Executors and Administrators**—Decree of Distribution.—Decree of distribution, having become final, can be vacated only on the ground of extrinsic fraud.—Warren v. Ellis, Cal., 179 Pac. 544.

38.——Homestead.—Land which constituted the homestead of a person in Florida is not an

asset in the hands of the owner's administrator. —Raulerson v. Peeples, Fla., 81 So. 271.

39.——Personal Property.—Title to personal property of a decedent's estate vesting in the administrator, on his qualification, it is his duty to protect it as against claims therefor of others against the estate.—In re Tamer's Estate, Ariz., 179 Pac. 644.

40. **Exemptions** — Automobile. — An automobile is not included within Code Civ. Proc. § 690, subd. 6, exempting certain vehicles which may be drawn by "one or two horses" from attachment levy and sale under execution.—Crown Laundry & Cleaning Co. v. Cameron, Cal., 179 Pac. 525.

41.——**Forfeiture.**—A married woman's right to a personal property exemption guaranteed by Const. art. 10, § 1, is not forfeited even by a fraudulent conveyance.—Bristol Grocery Co. v. Balls, N. C., 98 S. E. 768.

42. **Frauds, Statute of**—Oral Agreement.—An oral partnership agreement, involving nothing more than the taking of options on real estate and afterwards selling the options, is not void under the statute of frauds.—Mullholland v. Patch, Mich., 171 N. W. 422.

43. **Fraudulent Conveyances** — Badge of Fraud.—In a suit by a creditor to set aside as fraudulent a deed made by his debtor, the failure of the debtor to call important witnesses to his transaction relating to such deed constitutes a badge of fraud.—Florence W. McCarthy Co. v. Saunders, W. Va., 98 S. E. 800.

44.——Good Faith.—Though an alleged fraudulent buyer of debtor's sawmill property, etc., acted in good faith, there was no sale, where no price was ever fixed until execution of an act of sale after buyer had knowledge of intended attachment of property by another creditor and the financial troubles of debtor.—Mechanics Bank of McComb City, Miss. v. Van Zant, La., 81 So. 251.

45.——Preference.—In an action in a state court, the right of one creditor to receive payment of his indebtedness in preference to another creditor is governed by the common-law rule, which protects such payment, and not by the law of bankruptcy, by which such payment might be declared preferential.—Houseman-Spitzley Corporation v. American State Bank, Mich., 171 N. W. 543.

46.——Setting Aside.—When a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely; but there are suspicious circumstances as to the adequacy of consideration and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand for the sum already paid.—Matlock v. Alm, Ore., 179 Pac. 570.

47. **Homicide** — Conspiracy. — In prosecution for assault with intent to murder, it was proper to show that each defendant became an accessory before the fact through a conspiracy entered into before the shooting took place, and upon proof of such conspiracy, proof of a defendant's participation in the shooting became a matter of secondary importance.—Bianchi v. State, Wis., 171 N. W. 639.

48.——Deadly Weapon.—Although one may resist an illegal arrest, he is not entitled to resort to a deadly weapon from the mere fact that an arrest is illegal.—People v. Seeley, Cal., 179 Pac. 541.

49.——Provocation.—If one lashes himself into a fury at some slight provocation, or without provocation and reasonable excuse, he cannot, because of such passion reduce the killing to manslaughter.—Commonwealth v. Russoguio, Pa., 106 Atl. 180.

50. **Husband and Wife**—Entireties.—A life lease to a man and his wife created an estate by entirety, giving neither party a right, title, or interest which may be incumbered or conveyed away by his or her sole act; the survivor taking the whole estate, the duration of which is measured by the survivor's life.—Truitt v. City of Battle Creek, Mich., 171 N. W. 338.

51.——Necessaries.—In prosecution of husband for refusal and neglect to support, the test, in determining whether wife was justified in leaving the home provided by the husband, is whether a third person would be entitled to recover against the husband for necessaries furnished the wife.—People v. Kellogg, Mich., 171 N. W. 410.

52. **Injunction**—Citizen of State.—A citizen of a state will be enjoined by the courts thereof from prosecuting an action against another citizen of the same state, in a foreign state, for the purpose of evading the laws of his own state.—Culp v. Butler, Ind., 122 N. E. 684.

53. **Insurance**—Condition of Policy.—Condition of life policy that it shall be void if on the date of delivery insured be not in sound health is reasonable and enforceable.—Mutual Life Ins. Co. of Baltimore v. Willey, Md., 106 Atl. 163.

54.——Policy.—Notwithstanding policy provision that premiums should be payable annually in advance on the 12th day of September of each year, the date from which the period covered by premium payments is computed is the date when the policy went into effect, although the policy took effect on a later day in September. —Lyke v. First Nat. Life & Accident Ins. Co., S. D., 171 N. W. 603.

55.——Payment of Premium.—While mere giving of note for premium due will not work payment, insurer may treat note as being equivalent of cash, and so deal with insured as to waive right to deny that note, though not actually paid at maturity, worked an actual payment.—Highland v. Iowa Life Ins. Co., Iowa, 171 N. W. 587.

56.——Proximate Cause.—Generally, any loss or injury is occasioned by a peril of the sea which has for its proximate cause the fortuitous action of the sea, operating either singly or in conjunction with other elements or causes, or is peculiar to transportation by vessels supported by the sea or its buoyancy.—Charles Clarke & Co. v. Mannheim Ins. Co., Tex., 210 S. W. 528.

57. **Judgment**—Amendment.—After adjournment of term during which judgment was rendered, trial judge lost all jurisdiction to correct error in allowing excessive interest.—Texas Harvester Co. v. Willson-Whaley Co., Tex., 210 S. W. 574.

58——Without Prejudice.—Decree dismissing "without prejudice" a suit to compel reconveyance of land left the issues open to be litigated again in a subsequent proceeding between the parties.—McIntyre v. McIntyre, Mich., 171 N. W. 393.

59. **Life Estates**—Remainderman.—A life tenant may not cut off the remainderman and acquire title in fee by purchase of outstanding incumbrances he is under legal obligations to pay.—Truitt v. City of Battle Creek, Mich., 171 N. W. 338.

60. **Master and Servant** — Assumption of Risk.—An experienced longshoreman engaged in loading buckets of dirt, which were hoisted out of the hold of a vessel and by means of a winch and tackle swung over to a lighter and dumped, who knew there was no landing man to watch for descending buckets, assumed the risk of injury thereof.—Cunard S. S. Co. v. Smith, U. S. C. C. A., 255 Fed. 846.

61.——Negligence.—The master is not an insurer of the safety of servant, and negligence as between him and the servant must be measured by the character and danger of the business engaged in.—Turner Day & Woolworth Handle Co. v. Allen, Ky., 210 S. W. 477.

62.——Scope of Employment.—In an action by a servant for injury from explosion, evidence held sufficient to show that the employe whose negligence caused the explosion was acting within the scope of his employment.—Abilene Steam Laundry Co. v. Carter, Tex., 210 S. W. 571.

63.——Unexplained Accident.—An experienced helper, who fell from a ladder used in his own way while delivering ice in an opening in a

wall seven feet above the level, cannot recover for his injuries, where there was no evidence as to what caused his fall, and where the ladder was safe.—Freeland v. Consolidated Ice Co., Pa., 106 Atl. 197.

64.——Warning.—The danger that an ore chute in a mine might be clogged and might well open with a rush so as to swallow miners who were shoveling ore therein is a latent danger as to inexperienced miners, and they should be given warning.—Ozark Smelting & Mining Co. v. Silva, U. S. C. C. A., 255 Fed. 821.

65.——Workmen's Compensation Act.—The Workmen's Compensation Act is a remedial statute and is to receive a liberal construction.—Pater v. Superior Steel Co., Pa., 106 Atl. 202.

66. **Mines and Minerals**—Interest in Land.—An oil lease is a conveyance of an interest in land.—McEntire v. Thomason, Tex., 210 S. W. 563.

67. **Negligence**—City Ordinance.—Breach of a city ordinance is only evidence of negligence, and not negligence per se.—Rotter v. Detroit United Ry., Mich., 171 N. W. 514.

68.——Presumption of Care.—The presumption of due care ceases to operate when direct, positive and credible rebutting evidence is introduced.—Gillett v. Michigan United Traction Co., Mich., 171 N. W. 536.

69. **Parent and Child**—Dangerous Work.—To enable parent to recover from employer of minor child injured in employment for loss of services and medical expenses, employer must have known, or, in exercise of ordinary care, been chargeable with knowledge, of infancy of child, employment must have been made without knowledge or consent of parent, and child must have been employed for and put at dangerous work, at least to such extent injury would likely result.—Ballard v. Smith, Ky., 210 S. W. 489.

70. **Partition**—Common Title.—A parol partition of land does not effect a severance of the common title, unless followed by actual possession of the parcels in severalty in such manner and to such an extent as to effect ousters of the parties by one another, and for such time as is sufficient to vest title by adverse possession.—Hutchens v. Denton, W. Va., 98 S. E. 808.

71. **Partnership**—Executory Contract.—The mere failure of a partner to pay money into the partnership under a partnership agreement will not work a forfeiture of his interest and a dissolution of the partnership, but abandonment may be implied from acts and conduct of the parties inconsistent with an intention on their part to continue the contract, especially in regard to contracts executory in their nature where little has been done toward their performance.—First Nat. Bank v. Rush, Tex., 210 S. W. 521.

72.——Joint and Several Obligation.—Generally, and at common law, a partnership obligation is joint, and not joint and several.—Iwanaga v. Hagopian, Cal., 179 Pac. 523.

73. **Principal and Agent**—Delegation of Authority.—The basis of the rule which forbids an agent to delegate his authority to another is that the business to be transacted is such that it requires judgment or skill on behalf of the agent, and that the principal is entitled to the judgment and skill of the agent which he selects.—Mercantile Trust Co. v. Paulding Stave Co., Mo., 210 S. W. 438.

74.——Undisclosed Principal.—If one represents himself as the agent of a disclosed principal and attempts to contract in the name of such principal without authority or in excess of his authority, he becomes liable to the third party, not on the contract unless it contains apt words to bind himself, but for breach of the express or implied covenant of authority or, in a proper case, in an action of fraud and deceit.—Griswold v. Haas, Mo., 210 S. W. 356.

75. **Principal and Surety**—Demand of Surety.—A surety by verbal demand upon his creditor cannot compel creditor to proceed against the principal under section 1058, Rev. Laws 1910.—Gregg v. Oklahoma State Bank of Ada, Okla., 179 Pac. 613.

76. **Robbery**—Felonious Intent.—An essential element of the crime of assault and robbery without a dangerous weapon, denounced by Comp. Laws 1915, § 15208, is that defendant had a felonious intent at the time of counseling, aiding and abetting the commission of the offense.—People v. McKeighan, Mich., 171 N. W. 500.

77. **Sales**—Cancellation.—That buyer of personalty to be delivered in installments had some difficulty in financing payments as they matured, of itself afforded no ground for cancellation of contract.—Cadillac Mach. Co. v. Mitchell-Diggins Iron Co., Mich., 171 N. W. 479.

78.——Conditional Sale.—A conditional sale of an automobile in California, where it was not necessary to register the instrument, upon removal of the automobile to Texas by the purchaser, is void as against a bona fide purchaser for value in Texas, unless registered.—Chambers v. Consolidated Garage Co., Tex., 210 S. W. 565.

79.——Food.—In the absence of statute, a restaurant keeper is not liable on ground of implied warranty of fitness of food furnished by him.—Loucks v. Morley, Cal., 179 Pac. 529.

80.——Replevin.—Fraud or misrepresentations upon the part of the buyer will entitle the seller to reclaim the goods from the buyer by replevin.—Pearson v. Wallace, Mich., 171 N. W. 402.

81. **Specific Performance**—Equity.—While ordinarily specific performance will not be decreed, unless plaintiff has fully complied with his part of the contract, his failure to perform after having been notified by words or conduct of defendant that further performance would be useless, will not prevent court from decreeing specific performance.—Cape Girardeau-Jackson Interurban Ry. Co. v. Light & Development Co. of St. Louis, Mo., 210 S. W. 361.

82. **Tenancy in Common**—Constructive Possession.—The possession by one tenant in common is the common possession of all, that is, constructively the possession of all; the possession of one being deemed to be for the benefit of himself and his co-tenants in common.—Bakemeier v. Bakemeier, Ind., 122 N. E. 681.

83. **Trade-Marks and Trade-Names**—Firm Name.—The naming of stores, "Jos. Hilton & Co.," can be enjoined by a system of stores named "The Hilton Company," although the name of the proprietor of the former system of stores is Joseph Hilton.—Hilton v. Hilton, N. J., 106 Atl. 139.

84. **Trusts**—Presumption of Gift.—Where land is purchased by a husband with his separate funds and the deed is taken in the name of his wife, a prima facie presumption arises that he intends to make a gift to his wife, but such presumption may be overcome by competent proof that husband's intention was not to make a gift.—Kennedy v. Kennedy, Tex., 210 S. W. 581.

85. **Vendor and Purchaser**—Merchantable Title.—Contract requiring vendor to furnish an "abstract showing good merchantable title" does not condemn a title for lack of record evidence, or require a party to accept a title if it is clouded by another title, lien, or incumbrance outside of the record title. (Per Woodson and Graves, JJ.)—Jamison v. Van Auken, Mo., 210 S. W. 404.

86. **Wills**—Children.—Unless a different intent plainly appears, "children" in a devise is a word of purchase, not of limitation.—Hutchens v. Denton, W. Va., 98 S. E. 808.

87.——"Issue."—The word "issue" is in its nature ambiguous, and may be a word of purchase or limitation, and its use alone will be insufficient to reduce an explicitly devised estate in fee simple to an estate tail.—Rhode Island Hospital Trust Co. v. Bridgham, R. I., 106 Atl. 149.

88.——Heirs.—The use of the word "heirs" in a will is not necessary in order to create an estate in fee simple.—Hollway v. Atherton, Mich., 171 N. W. 413.

89.——Testamentary Capacity.—A person under guardianship may be competent to make a will.—Reeves v. Hunter, Iowa, 171 N. W. 567.